LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 15 1968
JOHN F. DAVIS, CLERK

No. 527

In the Supreme Court of the United States

OCTOBER TERM, 1968

BERNARD F. CURRY AND MARVEL I. CURRY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

MITCHELL ROGOVIN,
Assistant Attorney General,

WILLIAM A. FRIEDLANDER,
FRANK K. GREER, JR.,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 527

BERNARD F. CURRY AND MARVEL I. CURRY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1956, petitioner [1] entered into a stock purchase contract with one Olin W. Harbett ("Harbett"). Through this contract, petitioner acquired one half of the stock in seven Florida corporations. Petitioner's transactions with two of these corporations, Olin's, Inc. ("Olin's"), and Olin's Airport U-Drive-It, Inc.

[1] Since a joint tax return was filed, Mrs. Curry joined in this refund suit. "Petitioner" refers to the husband, Bernard F. Curry.

("Airport"), both of which were involved in the car rental business, are the subject of this lawsuit. (Pet. App. 2-3.)

The 1956 stock purchase contract recites only a nominal consideration of ten dollars, but the evidence revealed that the petitioner acquired the stock in the corporations for $50,000. Under the contract, petitioner also promised personally to advance to the corporations the sum of $200,000, and to secure other lines of credit, these considerations being the basis for the petitioner's right to participate in the management of the corporations. In 1960, Harbett transferred to petitioner the remaining fifty per cent of the capital stock in Airport and Olin's for no additional consideration. (Pet. App. 3.)

Pursuant to his commitment under the stock purchase agreement, petitioner, in 1956, personally advanced $100,000 on each of two occasions to Olin's, receiving in exchange on each occasion a demand note from Olin's for $100,000. The first note was unsecured and non-interest bearing. The second $100,000 note carried six per cent interest, but was unsecured. A rider was later attached to this note whereby Olin's assigned its accounts receivable as collateral for the advance. (Pet. App. 3-4). In 1958, petitioner advanced an additional $75,000. Olin's repaid $125,000 in 1960, leaving a balance of $150,000. In 1961, Olin's borrowed an additional $200,000 from a bank on petitioner's guaranty. Later in 1961, Olin's defaulted on this note and petitioner repaid the principal and interest in the aggregate amount of $202,527.78. (Pet. App. 4.)

In 1958, petitioner opened and guaranteed a $250,000 unsecured line of credit for Airport from a local bank. In 1959, Airport repaid the bank $150,000, but because of financial difficulties could not pay the rest. Petitioner advanced Airport $100,000 to pay off this note. Also during 1958, petitioner made other advances to Airport, $25,000 of which was never repaid. Petitioner's net total uncollectible advances to Airport aggregated $125,000. (Pet. App. 4.)

It is undisputed that these companies, because of their financial problems, were able to borrow money from lending institutions only on the strength of petitioner's guaranty. Petitioner's purpose in making the advancements and guaranty payments to and on behalf of the corporations was to provide the operating capital necessary to continue their operations. Petitioner claimed that this was extremely necessary because his automobile financial empire consisted of these two corporations plus many others. He reasoned that the failure of any one could adversely affect all of his corporations because he operated on a large personal line of credit. Petitioner contended that once he got into the situation, he had to continue through fear of his empire's collapsing. (Pet. App. 4-5.)

The district court, based upon the above facts, concluded that the advances and guaranty payments made by the petitioner to and on behalf of the corporations were contributions to capital and not indebtedness (Pet. App. 5). As an alternative holding, the court decided that even if these advances and guaranty payments were indebtedness, they were deductible only as non-business bad debts (Pet. App. 6). On

a second issue—concerning claimed deductions for travel and entertainment expenses for the years 1959 through 1961—the district court accepted the government's concession that the 1961 deductions were substantiated, but disallowed the deductions for 1959 and 1960 because they were not substantiated (Pet. App. 6). The Fifth Circuit affirmed [2] (Pet. App. 9).

1. Petitioner now claims for the first time (Pet. 7) that the guaranty arrangements with his controlled corporations (as opposed to the direct advances) are indebtedness by reason of this Court's holding in *Putnam* v. *Commissioner*, 352 U.S. 82. In the district court and in the court of appeals, petitioner dealt with all the transactions as related and indistinguishable for purposes of determining whether they were debt or equity. His new contention, therefore, should not be considered here.

2. In no event does *Putnam* v. *Commissioner*, *supra*, have the significance petitioner claims. In *Putnam*, this Court held that a loss incurred on a guaranty payment made by a shareholder on behalf of his corporation could not be deducted as a loss from a transaction entered into for profit under Section 23(e)(2) of the 1939 Code (now Section 165(c) of the 1954 Code). The opinion goes no further than to rule that payment under a guaranty is for tax purposes equivalent to a direct advance to a corporation and that Congress intended to put all nonbusiness investments, including guaranties, on an equal footing. The Court did not have before it the further question, here be-

[2] It did not reach the district court's alternative holding on the debt issue.

latedly sought to be raised by petitioner, whether the claim against the corporation to which the stockholder-guarantor becomes subrogated is always a bona fide debt in the hands of the guarantor, merely because it may have had that status in the hands of the original creditor.[3] Consequently, the decision in *Putnam* in no manner conflicts with the settled view that a transaction in the form of guaranty, just as a transaction in the form of a debt, can constitute a contribution of capital if entered into for the purpose of acquiring, or preserving or increasing the value of an investment. See, *e.g.*, *Syer* v. *United States*, 380 F. 2d 1009 (C.A. 4); *Estate of McGlothlin* v. *Commissioner*, 370 F. 2d 729 (C.A. 5); *Menihan* v. *Commissioner*, 79 F. 2d 304 (C.A. 2); see, also, *Burnet* v. *Clark*, 287 U.S. 410; *In re Park's Estate*, 58 F. 2d 965 (C.A. 2).

3. The legal standard applied by the court of appeals to resolve the debt-equity question does not (see Pet. 8-9) conflict with *Diamond Bros. Co.* v. *Commissioner*, 322 F. 2d 725 (C.A. 3), and *Wilshire & West. Sandwiches, Inc.* v. *Commissioner*, 175 F. 2d 718 (C.A. 9). The court of appeals did not, as petitioner would have it, hold that the lack of a fixed maturity required a characterization of petitioners' payments

---

[3] Such a rule would provide shareholders with a convenient formalistic means of circumventing the long-established principles governing the debt-equity issue since a shareholder wishing to cast in the form of debt for tax purposes an investment that would otherwise be treated as equity under the established tests need only arrange for a third party to make the initial advance of the "loan" under a commitment from the shareholder to take it over shortly, either by outright purchase or by guaranty on default.

as contributions to capital. It merely recognized that lack as an important element [redacted] which, together with the other evidence, adequately supported the trial court's finding. This approach is universally recognized by the courts. See, *e.g.*, *Schine Chain Theatres, Inc.* v. *Commissioner*, decided April 12, 1963, 22 T.C.M. 488, 500, affirmed *per curiam*, 331 F. 2d 849 (C.A. 2); *Montclair* v. *Commissioner*, 318 F. 2d 38 (C.A. 5); *Charter Wire, Inc.* v. *United States*, 309 F. 2d 878 (C.A. 7); *Kohler-Campbell Corp.* v. *United States*, 298 F. 2d 911, 913 (C.A. 4); *O. H. Kruse Grain & Milling* v. *Commissioner*, 279 F. 2d 123, 125-126 (C.A. 9); *Bowersock Mills & Power Co.* v. *Commissioner*, 172 F. 2d 904, 907 (C.A. 10).

In neither of the two cases cited by petitioner was there an affirmative consideration and rejection of the significance of a fixed maturity date. In *Wilshire*, the question was not placed in issue or mentioned by the court—possibly because the instruments there had a fixed maturity date. Compare *O. H. Kruse Grain & Milling* v. *Commissioner*, *supra*. In *Diamond Bros.*, although the concept was not mentioned, the Third Circuit (322 F. 2d at 733) gave significance to the finding of the Tax Court that "the advances would be repaid only if [the corporation] prospered". The very essence of the significance given to a fixed maturity date is the right given, and the presumption that it will be enforced, to collect on a given date regardless of the financial condition of the corporation. Indeed, in *P. M. Finance Corp.* v. *Commissioner*, 302 F. 2d 786, 790, decided a year earlier than *Diamond Bros.*, the Third Circuit referred to "the power to

demand payment at a fixed maturity date" as "another basic attribute of creditor status".

4. Nor is there merit to petitioner's argument (Pet. 9) that the refusal of the court of appeals to direct the trial court to approximate alleged travel and entertainment expenses for the taxable years 1959 and 1960—which were denied in full—conflicts with *Cohan* v. *Commissioner*, 39 F. 2d 540 (C.A. 2). Petitioner testified in the district court that he incurred entertainment expenses relating to his investments (R. 249-250),[4] but he offered nothing in corroboration, such as particular events, persons or amounts. There was no basis for an approximation, under *Cohan* or any other authority.[5]

---

[4] "R." refers to the record in the court of appeals.

[5] Whether there is a conflict is of no remaining importance since the question has been rendered largely academic by the enactment of Section 274 of the Internal Revenue Act of 1954 (by the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960, Sec. 4), which abolishes the *Cohan* rule for periods after December 31, 1962, by requiring extensive substantiation of all travel and entertainment expenses. See S. Rep. No. 1881, 87th Cong., 2d Sess., p. 35; H. Rep. No. 1447, 87th Cong., 2d Sess., p. 23. Although under Section 274(e), expenses for "business meals", as were allegedly incurred here, need not meet the stringent substantiation requirements of Section 274(a), they must meet the substantiation requirements of subsection (d) as to amounts, places, and the like.

The petition for certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

WILLIAM A. FRIEDLANDER,
FRANK X. GROSSI, JR.,
Attorneys.

OCTOBER 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 321920 245